

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

SARA M. SLATERY

Plaintiff

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Civil Action No. 1:97cv401-D-A

NORTHEAST MISSISSIPPI CONTRACT  
PROCUREMENT CENTER, INC., et al.

Defendants

MEMORANDUM OPINION

Presently before the court is a motion to remand filed by six of the seven defendants in this action. Finding the motion well-taken, the court shall remand this action to the Circuit Court of Lowndes County, Mississippi.

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Factual and Procedural Background

The plaintiff Sara M. Slatery filed the present action in the Circuit Court of Lowndes County, Mississippi, after her discharge from the Northeast Mississippi Contract Procurement Center, Inc., (the Center). The Center is a non-profit corporation organized under the laws of Mississippi "for the civic improvement of North Mississippi and to assist and promote overall economic development of the State of Mississippi by assisting Mississippi businesses in obtaining contracts with federal, state and/or local government." Declaration of Maurice Smith, exhibit "A" (entitled "By-Laws of [the Center]"), unnumbered page 1. Ms. Slatery, who served the Center as its Executive Director, claims that the defendants – the Center and six of the members of its Board of Directors – breached the Center's contract with her when the Board of Directors voted to

terminate her employment in 1997.

One of the defendants, Maurice Smith, removed this action to this court on December 10, 1997. Citing the statute authorizing removal by officers of the United States in certain cases, Mr. Smith claimed that this court had subject matter jurisdiction over this case because he served on the Center's Board of Directors as a representative of an agency of the United States. Mr. Smith was the only defendant to file the Notice of Removal. The other six defendants oppose removal and have jointly filed the present Motion to Remand. Those six defendants are (1) Northeast Mississippi Contract Procurement Center, Inc., (the Center), (2) Thomas L. Stennis, (3) Louise Campbell, (4) Morris Denton, (5) Mark Leonard and (6) Charleigh Ford. The plaintiff, Ms. Slatery, has filed a brief in opposition to the Motion to Remand.

## II. Discussion

Mr. Smith claims that removal was proper under 28 U.S.C. § 1442. Section 1442 allows the removal of civil actions filed in State court against officers of the United States for any act under color of such office. Specifically, the section provides,

(a) A civil action . . . commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or any agency thereof, sued in an

official or individual capacity for any act under color of such office . . .

28 U.S.C. § 1442(a)(1). "The removing party bears the burden of establishing the facts necessary to show that federal jurisdiction exists . . . ." Allen v. R&H Oil & Gas Co., 63 F.3d 1326, 1335 (5<sup>th</sup> Cir. 1995) (citing Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252, 253-54 (5th Cir.1961)).

Facing this burden, Mr. Smith argues that his vote to discharge Ms. Slatery was an act under color of his office with the United States. Of course, when Mr. Smith voted he did so as a member of the Center's Board of Directors, and the Center is a non-profit corporation organized under the laws of the State of Mississippi. However, Mr. Smith claims that he was appointed to the Center's Board as a "representative" of the Tennessee Valley Authority (TVA).<sup>1</sup> Response to Motion to Remand, pp. 3, 4. The Center's

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<sup>1</sup>In their Rebuttal Brief in Support of Motion to Remand, the non-removing defendants discuss the constitutionality of a section of the United States Code providing a certification process by which TVA may certify that an employee was acting within the scope of his office in a particular instance. The section they discuss provides in pertinent part,

(2) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in State court shall be removed . . . . This certification of the Tennessee Valley Authority shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Tennessee Valley Authority has refused to certify scope of office or employment under this section, the employee may at any time before

by-laws provided for his appointment to the Board as follows:

The Board of Directors of this corporation shall be composed of one representative from each of the following organizations: Clay County, Columbus-Lowndes Chamber of Commerce, Columbus-Lowndes County Economic Development Association, Four County Electric Power Association, North Mississippi Industrial Development Association, Tennessee Valley Authority, and the Executive Director.

Declaration of Maurice Smith, exhibit "A," unnumbered page 3.

TVA is an agency of the United States. PRI Pipe Supports v. TVA, 494 F. Supp. 974, 975 (N.D. Miss. 1980); see also 16 U.S.C. §§ 831- 831dd. At all times relevant to this action, Mr. Smith was employed by TVA as Regional Manager for Economic Development. Therefore, Mr. Smith argues, "on July 28, 1997, when Smith (and the other Board members) voted to eliminate the position of Executive Director and to terminate plaintiff's employment effective September 30, 1997, he was engaged in his official duties and responsibilities as Regional Manager serving as TVA's representative on the Board." Response to Motion to Remand, p. 4.

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trial petition the court . . . . If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

16 U.S.C. § 831c-2(b) (2), (3). Mr. Smith has not shown this court that TVA certified that he was acting within the scope of his office when he voted to terminate Ms. Slatery's employment. Therefore, this court need not address the constitutionality of § 831c-2(b). See Rebuttal Brief in Support of Motion to Remand, pp. 10-18.

The dispute here boils down to the question whether Mr. Smith's vote was an "act under color" of his office with TVA. On this topic, the Fifth Circuit has stated, "An officer is acting under color of office so long as he does not depart from the course of his duty so that it becomes his personal act." Allman v. Hanley, 302 F.2d 559, 561 (5<sup>th</sup> Cir. 1962). The exclusion of any suit against an officer for "his personal act" is a reflection of the purpose of § 1442(a)(1):

Through the removal statute, Congress sought to protect the *exercise of legitimate federal authority* from the interference of hostile state courts by providing federal officials with a federal forum in which to raise defenses arising from their official duties. . . . [T]he rationale that underlies the removal statute [is] that federal officers are entitled to, and the interest of national supremacy requires, the protection of a federal forum in those actions commenced in state court that could arrest, restrict, impair, or interfere with the *exercise of federal authority* by federal officials.

Murray v. Murray, 621 F.2d 103, 106 (5<sup>th</sup> Cir. 1980) (emphasis added). Accordingly, another way to express the question before the court today is whether Mr. Smith's act of voting was a "personal act" or an "exercise of federal authority."

Finding that Mr. Smith fails to carry his burden to show that his act of voting on the Center's Board was an exercise of federal authority, this court concludes that the act was personal. In so finding, this court is aware of the Supreme Court's admonition that the rationale of § 1442(a)(1) "should not be frustrated by a narrow, grudging interpretation . . . ."

Willingham v. Morgan, 395 U.S. 402, 407, 89 S. Ct. 1813, 1816, 23 L. Ed. 2d 396 (1969). In Willingham, a prisoner brought an action in state court against the warden and chief medical officer of a federal prison. The plaintiff alleged that the defendants had frequently beaten him. The defendants removed the action to federal court under § 1442(a)(1) "alleging that anything they may have done to [the plaintiff] 'was done and made by them in the course of their duties as officers of the United States of America . . . and under color of such offices . . .'" Willingham, 395 U.S. at 403, 89 S. Ct. at 1814. Finding that the defendants had acted under color of their offices for purposes of § 1442(a)(1), the Supreme Court explained,

Past cases have interpreted the 'color of office' test to require a showing of a 'causal connection' between the charged conduct and asserted official authority. . . . In this case, once [the defendants] had shown that their only contact with [the plaintiff] occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required 'causal connection.' The connection consists, simply enough, of the undisputed fact that [the defendants] were on duty, at their place of federal employment, at all the relevant times. If the question raised is whether they were engaged in some kind of 'frolic of their own' in relation to [the plaintiff], then they should have the opportunity to present their version of the facts to a federal, not a state, court. That is exactly what the removal statute was designed to accomplish.

Willingham, 395 U.S. at 409, 89 S. Ct. at 1817. This case is factually distinguishable from Willingham. There, the defendants committed the allegedly wrongful acts at the federal workplace

during the hours of their federal employment. Here, on the other hand, Mr. Smith did not vote to terminate Ms. Slatery at TVA, but at a meeting of the Board of Directors of a non-profit corporation organized under state law. Mr. Smith claims that he was acting in a representative capacity for TVA. However, he fails to show this court evidence that TVA itself or a related statute or regulation granted him federal authority to exercise on that Board. Therefore, unlike the plaintiff in Willingham, Mr. Smith cannot show a causal connection between the charged conduct and the asserted federal authority.

Mr. Smith does offer this court proof of the Center's by-laws which require that a member of the Center's Board be a "representative" of TVA. However, the Center's requirement that a TVA "representative" sit on its Board does not convey upon Mr. Smith power to act for TVA on that Board. Mr. Smith also argues that he "used reasonable and necessary TVA resources, including other TVA employees and TVA's equipment and material." Response to Motion to Remand, pp. 3, 4. However, the fact that Mr. Smith used TVA resources does not mean that TVA conferred upon Mr. Smith power to act for TVA on the Board. In his declaration, Mr. Smith makes two broad claims: (1) "Whenever I am involved in Board business, I am on duty as Regional Manager [of TVA];" and (2) "I sit on the Board by virtue and as part of my official duties and responsibilities and in the course and scope of my TVA

employment as Regional Manager." Declaration of Maurice Smith, ¶¶ 3, 4. These claims are vague<sup>2</sup> because they do explain how TVA authorized Mr. Smith to exercise legitimate federal authority on the Board, much less whether TVA in fact did so. Further, the statements are conclusory<sup>3</sup>.

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<sup>2</sup>Mr. Smith argues that his "declaration is conclusive on the point that his conduct, which forms the basis of the complaint against him, arises out of his duties and responsibilities as a federal employee." Response to Motion to Dismiss, at 4. To support this legal proposition, Mr. Smith cites a District Court opinion out of the First Circuit. In that case, the court found removal proper under § 1442 because the removing party's "allegations are not vague or uncertain as to any essential detail of the claimed defense and do not negative the possibility that they were doing other than official acts at the time or on the occasion of the alleged [wrongful act]." People v. Keim, 308 F.Supp. 421, 423 (S.D.N.Y. 1969). Here, on the other hand, the allegations of Mr. Smith are vague and uncertain. That is, his allegations fail to show how or even whether TVA granted upon Mr. Smith the authority which he claims it did, much less whether such a grant of authority would have been legitimate. Therefore, unlike the court in Keim, this court is not bound to treat Mr. Smith's declaration as conclusive.

<sup>3</sup>Mr. Smith argues that his claim is sufficient to overcome a motion to remand no matter how conclusory. Response to Motion to Remand, p. 6 ("Here, the notice of removal unequivocally states that he removed this case because 'the claims alleged against Smith in this action arise out of his official duties and responsibilities as an employee of TVA . . . '"). In support of this proposition, Mr. Smith cites Allman v. Hanley where the Fifth Circuit stated,

The absence of detailed grounds setting forth basis for removal is not fatal to defendants' right to remove. We think that the allegation that petitioners were officers acting under color of office in the employment of the United States was sufficient.

Allman, 302 F.2d at 562. That statement in Allman is not as broad as Mr. Smith purports it to be. In Allman, a civilian employee of the United States sued medical doctors of the United States Air Force for injuries sustained as the result of surgery performed in a negligent manner. After the physicians removed



In sum, Mr. Smith fails to offer this court sufficient evidence as to what federal authority TVA conferred upon him as a member of the Center's Board. Mr. Smith states that he was TVA's "representative" on the Center's Board. However, Mr. Smith offers this court no proof that he was given or exercised federal authority on the Board. Of course, were there sufficient evidence here regarding such authority, this case would have a different completion. However, all Mr. Smith offers this court is vague or conclusory allegations. Accordingly, Mr. Smith fails to carry his burden to show a causal connection between the act of which Ms. Slatery complains and some federal authority.

Incidentally, Mr. Smith presents his best proof that his vote was an act under color of his federal office in a single sentence of his declaration. In that sentence, Mr. Smith states, "If I were not Regional Manager, TVA would not have chosen me to be its representative." Declaration of Maurice Smith, ¶ 3. The

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under § 1442(a)(1), the plaintiff essentially argued in his motion to remand that "the doctors may well have had the official duty to perform operations, but they were not authorized to perform operations negligently." Id. at 561. It was regarding that tenuous argument when the Fifth Circuit stated, "[T]he allegation that petitioners were acting under color of office in the employment of the United States was sufficient." Id. at 562. Now Mr. Smith asks this court to extend the Fifth Circuit's statement in Allman to this case. However, this court finds that Mr. Smith has failed sufficiently to allege that he acted under color of office. Therefore, Allman does not apply on this point. Allman does not require this court to deny a motion to remand where the color-of-office allegation is conclusory and therefore insufficient, as it is here.

argument for that proof runs as follows: TVA commanded Mr. Smith to sit on the Center's Board; therefore, sitting on the Board was a federal duty; therefore, a suit in State court against Mr. Smith for voting as a member of that Board interferes with the performance of a federal duty. As the Fifth Circuit has explained, "the purpose of section 1442(a)(1) is to permit federal officers to remove state court actions that could interfere with the operation of the federal government, *such as preventing federal officers from performing their official duties*. Hexamer v. Foreness, 981 F.2d 821, 823 (5<sup>th</sup> Cir. 1993) (citing Murray, 621 F.2d at 106). The problem with the argument here, however, is the insufficiency of Mr. Smith's evidence. In a single sentence, Mr. Smith offers this court only a fleeting glimpse into the origins of his position on the Center's Board of Directors. It seems reasonable to expect that, had TVA specifically instructed Mr. Smith to sit on the Board, there would be some letter, memorandum, regulation or policy embodying that instruction, or some witness to declare there was such an instruction. However, Mr. Smith offers this court no proof of the instruction beyond his statement, "If I were not Regional Manager, TVA would not have chosen me to be its representative." This statement is inferential, and it is vague. It does not state when, where or how TVA chose Mr. Smith as its representative. Nor does it clarify whether TVA itself labeled

Mr. Smith its "representative." Indeed, the only entity of which Mr. Smith offers proof using the term "representative" is the Center in its By-Laws. See Declaration of Maurice Smith, exhibit "A," unnumbered page 3. Therefore, Mr. Smith offers this court insufficient proof to support his argument that TVA ordered him to sit on the Center's Board. Of course, even if Mr. Smith had offered this court sufficient proof on this issue, a separate issue would remain as to whether Mr. Smith offers this court any evidence that such a command would have been legitimate under the statutory scheme creating TVA. See 16 U.S.C. §§ 831-831dd. In any event, this court finds insufficient the evidence that TVA ordered Mr. Smith to sit on the Center's Board.

### III. Conclusion

Having failed to present sufficient evidence establishing a causal connection between his vote to terminate Ms. Slatery and his office with TVA, Mr. Smith has failed to carry his burden to show that this court has subject matter jurisdiction over the present action. Therefore, this action must be remanded to the Circuit Court of Lowndes County, Mississippi.

A separate order in accordance with this opinion shall issue this day.

This the \_\_\_\_ day of February 1998.

United States District Court

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FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

SARA M. SLATERY

Plaintiff

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Civil Action No. 1:97cv401-D-A

NORTHEAST MISSISSIPPI CONTRACT  
PROCUREMENT CENTER, INC., et al.

Defendants

ORDER REMANDING ACTION

Pursuant to a memorandum opinion issued this day, it is  
hereby ORDERED that:

- (1) the Motion to Remand, filed by the defendants Northeast Mississippi Contract Procurement Center, Inc., Thomas L. Stennis, Louise Campbell, Morris Denton, Mark Leonard and Charleigh Ford, is hereby GRANTED; and
- (2) this action is hereby REMANDED to the Circuit Court of Lowndes County, Mississippi.

SO ORDERED, this the \_\_\_\_ day of February 1998.

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United States District Court